UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL MOTORS LLC

and **Case Nos. 14-CA-197985**
14-CA-208242

CHARLES ROBINSON, an Individual

BRIEF IN SUPPORT OF COUNSEL FOR THE GENERAL COUNSEL'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Counsel for the General Counsel respectfully files this brief with the National Labor Relations Board (Board). This case is before the Board based on a Complaint that Respondent, General Motors LLC, doing business in Kansas City, Kansas, violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act) when it suspended Charles Robinson (Robinson) for conduct he engaged in while acting as a United Automobile, Aerospace and Agricultural Implement Workers of America, Local 31 (Union) Representative on April 11, 2017, April 25, 2017, and October 6, 2017. Robinson received suspensions from Respondent on April 24, 2017, April 27, 2017, and October 17, 2017 for the afore-mentioned conduct. On November 14, 2017, Administrative Law Judge Donna N. Dawson conducted a hearing on this matter. Following submission of briefs by the parties, Judge Dawson issued a decision, dated September 18, 2018, in which she concluded that Respondent did not violate the Act when it suspended Robinson on April 27, 2017 for his statements during an April 25, 2017 labor-management meeting.

As discussed below, Counsel for the General Counsel's position is that Judge Dawson erred in finding that Respondent's April 27, 2017 suspension of Robinson did not violate the Act and requests the Board reverse the ALJD and find that the Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act when it suspended Robinson for his April 25, 2017 behavior during a labor-management meeting. Further, although Judge Dawson correctly held that an April 24, 2017 suspension[1] issued to Robinson violated the Act, she did not specifically state in the "Remedy" that all subsequent suspensions should subsequently be reduced pursuant to the progressive disciplinary procedure set forth in the parties' Local Agreement Between Fairfax Plant and Local #31 United Automobile Workers (Local Agreement). (Jt. Exh. 2). Robinson

[1] In the Remedy Section of her decision, the Administrative Law Judge states the suspension occurred on August 24, 2017. As the record makes clear, the suspension occurred on April 24, 2017.

should be made whole for the suspensions given to him after unlawfully issued discipline that was in excess of that required under the progressive disciplinary procedure.

I. FACTS

A. Robinson's April 27, 2017 Suspension

Respondent suspended Charging Party on April 24, 2017 for an April 11, 2017 incident. On April 25, 2017, Robinson returned to work from his suspension at around 7:00 am and headed to a 7:30 am "183 Meeting." (Tr. 38). "183 Meetings" are weekly meetings during which members of management and members of Union leadership bargain over employee work and the use of outside contractors. (Tr. 39). The 183 meeting took place in the Manager's Conference Room on the mezzanine level, not on the body floor. (Tr. 40). The meeting took place with the door closed and no production or maintenance employees were present during the meeting. (Tr. 40). CAC James Walton, Skilled Trades Committeeperson Ben Miller, and Robinson attended the April 25 183 meeting as representatives for the Union. (Tr. 41-2). Maintenance Manager Anthony Stevens, Engineering Manager Paul Sykes, Labor Relations Manager Ca-Sandra Tutt, Stamping Operations Manager Paul Fraelich, Engineer Arthur Lambert, Manufacturing Engineering Shift Lead Robert Pudvan, Technical Shift Leader Paint Chris Degner, and Manager Nick Nikolaenko attended the meeting as representatives of management. (Tr. 43-45; 188). Robinson sat in between Union representatives Walton and Miller at one end of a long conference room table and the management representatives were on either side of the table. (Tr. 41; GC Exh. 4).

Chris Degner started the meeting by presenting the case to have outside contractors come in and do some work. (Tr. 46). Robinson asked Degner about what jobs bargaining unit employees were going to be doing and what hours they would be working. (Tr. 46). Degner

could not really answer Robinson's questions, so Robinson began asking Manager Paul Sykes about who would be working and on what shifts. (Tr. 46). Manager Anthony Stevens interrupted and told Robinson that he did not have to worry about the schedule and that Robinson was getting loud. (Tr. 46-7). Robinson told Stevens that he was not being loud. (Tr. 47). Robinson then asked the management representatives when the Union could expect documents in response to an April 23, 2017 email Robinson sent to Stevens requesting information about the costs and hours of outside contractors. (Tr. 47; GC Exh. 3). Labor Relations Supervisor Tutt told Robinson that he didn't need the documents because the request was a fishing expedition. (Tr. 47).

During these conversations, Stevens kept telling Robinson that Robinson was getting loud; finally, Robinson asked Stevens, "What is loud doing to you?" (Tr. 49). Stevens told Robinson that Robinson was intimidating him. (Tr. 49). Robinson then said, "Sir, you want me to speak like this, sir, so I don't be intimidating you, sir? Mr. Sir." (Tr. 49). Robinson went on, "I'm trying to speak this way so I don't be intimidating you because you believe I'm intimidating you." (Tr. 49). Robinson's tone was sarcastic in nature and he was being "mock servile," like a smart aleck. (Tr. 119; 127). Anthony Stevens told Robinson he was being unprofessional and the members of management got up and left the meeting. (Tr. 50).

Robinson left the 183 meeting and went to Plant Manager's Bill Kulhanek's office to speak with him about what had happened during the meeting. (Tr. 50). Kulhanek wasn't in his office, so Robinson made an arrangement with Kulhanek's secretary, Michelle, to come back to the office at 11:00 am. (Tr. 50). Robinson went to Kulhanek's office because he felt he was being "railroaded" and Kulhanek had told Robinson previously that Robinson could come to his office and vent about problems on the floor instead of getting upset. (Tr. 50-1; 54). While

Robinson was waiting to speak with Kulhanek at 11:00 am, Labor Supervisor Tutt contacted Robinson on the radio and told Robinson he was being put on notice. (Tr. 51). Robinson then met with Kulhanek about his frustration and what happened during the 183 meeting. (Tr. 52).

On April 26, 2017, Robinson attended an investigatory interview in Labor Relations. (Tr. 55). Robinson met with Labor Supervisor Tutt and Union Zone Committeeperson Billy Gay. (Tr. 55). Tutt asked Robinson why he used a voice that was like a slave voice or a southern slave voice on television during the 183 meeting. (Tr. 56). Robinson told Tutt that he didn't know what a southern voice was and that he didn't know what she meant. (Tr. 56). Tutt asked Robinson why he said, "Yes Master," to Stevens. (Tr. 56). Robinson stated that he did not say "Master," but that he said "Yes, Mister." (Tr. 56). Tutt asked Robinson what was the difference between mister and master. (Tr. 56). Robinson said he wasn't going to play on words, but that "Mister" was a sign of respect and he was trying to give Anthony Stevens respect when he called him "Mister." (Tr. 56). Tutt then asked Robinson if he thought Anthony Stevens was a racist. (Tr. 56). Robinson responded that he did not know Stevens well enough to put that judgment on him and he didn't know if Stevens was a racist. (Tr. 56). Tutt asked a few more questions, but the meeting was soon recessed until the following day. (Tr. 57).

Ca-Sandra Tutt, Billy Gay, and Robinson reconvened on April 27, 2017 for a disciplinary hearing. (Tr. 57). At the April 27, 2017 meeting, Tutt gave Robinson a Notice of Disciplinary Action regarding the April 25, 2017 183 meeting. (Tr. 58; Jt. Exh. 5). Robinson refused to sign the April 27, 2017 Notice of Disciplinary Action because the Respondent issued discipline for two weeks, and not the one week which Respondent should have been due under the progressive discipline policy in the collective bargaining agreement. (Tr. 58; Jt. Exh. 2). Robinson and the

Union filed grievances regarding the April 27, 2017 Notice of Disciplinary Action, which are currently pending. (Jt. Exh. 7, 8, 9, 10).

B. Parties' Progressive Disciplinary Policy

The Respondent and the Union's Local Agreement includes a progressive disciplinary procedure. (Jt. Exh. 2; p. 94, Tr. 36). Under the disciplinary procedure, employees first receive joint counseling and then a written warning. (Jt. Exh. 2, p. 94; Tr. 36). For a third disciplinary offense, employees receive a balance of their shifts and three day suspension. (Jt. Exh. 2; p. 94, Tr. 36). After a fourth disciplinary offense, employees receive a suspension for the balance of their shifts and a week. (Jt. Exh. 2; p. 94, Tr. 37). Employees receive balance of shift and two weeks suspension for a fifth offense, balance of shift and thirty day suspension for a sixth offense, and are discharged after a seventh offense. (Jt. Exh. 2; p. 94, Tr. 37).

On April 24, 2017, Charles Robinson received discipline for an incident which occurred on April 11, 2017. (Jt. Exh. 4). Per the disciplinary procedure, Robinson received the balance of his shift and a three day suspension that would be removed after 12 months. (Jt. Exh. 4). On April 27, 2017, Robinson received a balance of shift and two week suspension for an incident that occurred during a labor-management meeting on April 25, 2017. (Jt. Exh. 5). On October 17, 2017, Respondent received the balance of shift and a 30 day suspension for an incident which occurred during a labor-management meeting on October 6, 2017. (Jt. Exh. 6).

II. EXCEPTIONS

As further analyzed below, Judge Dawson erred with regard to two main issues. First, Judge Dawson erred when she found that Robinson lost the protection of the Act during an April 25, 2017 labor-management meeting. (Exceptions 1, 8, 9). Judge Dawson erroneously found that Robinson used alleged "slave vernacular," diverted from his representational purpose, and

personally insulted Manager Stevens. (Exceptions 2-6). Further, Judge Dawson erred when she found that Robinson's April 25, 2017 statements were not provoked by an unfair labor practice. (Exceptions 7-8).

Second, Judge Dawson erred when she did not specify in the remedy that Respondent reduce all discipline lawfully issued to Robinson after the unlawful April 24, 2017 and April 27, 2017 suspensions consistent with the parties' progressive disciplinary policy. (Exception 10). In the alternative, should the Board affirm Judge Dawson's decision with regard to the April 27, 2017 suspension, Judge Dawson erred when she did not specify in the remedy that Respondent reduce all discipline lawfully issued to Robinson after the unlawful April 24, 2017 suspension consistent with the parties' progressive disciplinary policy and make Robinson whole for discipline received in excess of what the next step of the progressive disciplinary procedure called for.

III. ARGUMENT

A. On April 27, 2017, Respondent Suspended Robinson for Engaging in Protected Union Activity That Did Not Lose the Protection of the Act.

The record clearly demonstrates that Robinson engaged in protected Union activity during the April 25, 2017 183 Meeting. The purpose of the 183 Meeting was for representatives of the Union and Management to meet and discuss outsourcing at the Fairfax Facility. At the beginning of the meeting, Robinson began by asking management questions about having outside contractors come into the Fairfax Facility to perform work and how it would impact bargaining unit employees. Anthony Stevens did not want to discuss the matter further, so he told Robinson not to worry about it, thereby cutting off conversation on the topic. Robinson then asked Stevens and Ca-Sandra Tutt about a Request for Information he had emailed to Stevens several days before for the costs of outside contractors. Tutt told Robinson he would not receive

the requested information because it was a fishing expedition. It was at this point that Stevens told Robinson that he was getting loud and intimidating and Robinson responded by speaking in a subservient manner. Although Respondent alleges that Robinson's comments were racially insensitive, the fact that Respondent was engaged in protected Union activity when he made the comment is not at issue.

The Board looks to *Atlantic Steel* to determine whether Robinson lost the protection of the Act. The four factors used to determine whether an employee's outburst loses the protection of the Act are: (1) the place of the discussion, (2) the subject of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked in any way by the employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB, 814, 816 (1979). Using the factors in *Atlantic Steel*, Robinson clearly did not lose the protection of the Act.

1. Place of Discussion

The first factor of Atlantic Steel – place of discussion – weighs in favor of protection. The asserted outburst took place in a closed door meeting attended by representatives of the Union and Management whose sole purpose was to discuss terms and conditions of employment; therefore, there was no disruption to the workplace. No rank and file employees were in the room or overheard what happened. Some of Respondent's witnesses allege that Robinson made racially insensitive comments while in the hallway outside of the conference room; these allegations should be disregarded as they are not supported by the facts. If Robinson had made inappropriate comments in the hallway in front of rank-and-file individuals, one would assume that the Respondent would have included this behavior in the discipline issued to Robinson. The April 27, 2017 Notice of Disciplinary Action makes no mention of inappropriate comments outside of the conference room in front of bargaining unit employees.

2. Subject of Discussion

The second factor of *Atlantic Steel* – subject of the discussion – also weighs in favor of protection. The discussion during the 183 meeting centered on the circumstances in which Respondent would outsource work that directly affected Robinson's Union constituents. Although Stevens may not have wanted to answer questions about outsourcing and the costs involved, this subject is one directly tied to Respondent's position as a Union Committeeperson. Robinson also specifically asked questions regarding an outstanding request for information, a subject covered by the collective bargaining agreement. There is no question the second factor weighs in favor of protection.

3. Nature of the Outburst

The third factor of *Atlantic Steel* – the nature of the asserted outburst – also weighs in favor of protection. The Board gives Union representatives leeway when they are zealously representing the interests of their constituents. *Covanta Bristol, Inc. & Luis Mota.*, 356 NLRB 246, 254 (2010)(citing *Dreis & Krumpf Mfg.*, 221 NLRB 309, 315 (1975), enfd. 544 F.2d 320 (7th Cir. 1976)). Judge Dawson erred in finding that Robinson's language was solely personal in nature and was, therefore, removed from the protections of the Act. The facts do not support Judge's Dawson's finding; testimony from all parties clearly show that Robinson's comments were in response to Anthony Steven's repeated accusations that Robinson threatened him during a labor-management meeting. Robinson made the comments to make a point about how Robinson felt treated during labor-management meetings. Robinson did not make his comments in a personal context and there is no evidence Robinson would have made the comments but for his treatment by Stevens while performing his function as a union representative. Everyone agreed that Stevens repeatedly accused Robinson of speaking too forcefully and trying to

intimidate him, despite the fact that the record contains no evidence Robinson was a violent individual. Robinson used exaggerated language to prove a point about Anthony Stevens' treatment of him during a labor-management meeting, not to create a racially hostile work environment. When Robinson turned to sarcasm and purposely spoke to Anthony Stevens in a meek subservient manner, Respondent then accused Robinson of being a racist and punished him.

The Board has held that the "use of rhetorical hyperbole to emphasize disapproval of management" does not remove such communications of the Act. *Phoenix Transit Sys.*, 337 NLRB 510, 514 (2002). Where concerted activity is involved, the law gives individuals license "to use intemperate, abusive or insulting language without fear of restraint or penalty if the speaker believes such rhetoric to be an effective means to make a point." *Id.* at 514 (*citing Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974)). Robinson used hyperbolic language to demonstrate that he felt demeaned by Anthony Stevens during the labor management meeting, which clearly was an effective means to make his point. Robinson's response to Stevens' constant directives not to be loud is emblematic of how he viewed Stevens' trampling of Robinson's Section 7 rights. Just because Robinson used language that may have made members of management uncomfortable does not mean that it was so opprobrious as to remove his behavior from the protection of the Act.

The Administrative Law Judge incorrectly found that Robinson's comments were personal in nature and not related to his union activity; therefore, Robinson lost the protection of the Act. However, the record unequivocally demonstrates that Robinson made his comments directly in response to Stevens' attempt to stop him from engaging in union activity during a labor-management meeting. Robinson's comments did not reflect how he felt about Stevens

personally – Robinson made these comments in response to Steven's behavior during a labor-management meaning, not in response to a personal interaction. Indeed, the record shows that Stevens and Robinson had no personal relationship; all of the pertinent interactions strictly involved labor-management relations. Further, the Administrative Law Judge found that Robinson's comments rose from an "unfounded belief that Stevens treated him or wanted to submit to him like a slave." This is a mischaracterization of Robinson's testimony. Robinson did not refer to Stevens as a slave master and never referred to Stevens as racist; even if he had, such language did not remove Robinson from the protection of the Act. Robinson made no threats of physical violence and did not curse or call anyone names. Robinson did not feel that the Employer was treating him as an equal during a labor-management meeting and used hyperbolic language to make a point that he should be respected by management as an equal as they negotiated about terms and conditions of employment.

4. Provocation by Unfair Labor Practice

Finally, the fourth factor of *Atlantic Steel* - provocation by an unfair labor practice - also favors protection, contrary to the findings of Judge Dawson. Robinson did not attend the meeting to personally insult Stevens. Robinson made his comments because he was upset that Respondent's agents refused to answer questions about outsourcing and were potentially breaching the collective bargaining agreement, actions that directly impacted his constituents. Further, Respondent refused to provide the Union with relevant information pursuant to a valid request for information Robinson had submitted prior the meeting – an action which is an unfair labor practice on its own. Although Robinson was upset about what he believed was a breach of the collective bargaining agreement and a potential unfair labor practice, he was also responding to Anthony Stevens' constant complaints about Robinson's tone of voice and how he felt

intimidated. Based on these provocations, Robinson responded and did not lose the protection of the Act.

In summary, since all four *Atlantic Steel* factors favor that Robinson did not lose the protection of the Act, Respondent's discipline violates Sections 8(a)(1) and 8(a)(3) of the Act and the Board should grant Counsel for the General Counsel's exceptions to the ALJ's findings.

B. Due to Judge Dawson's finding that Robinson's April 24, 2017 suspension was unlawful, Robinson should be made whole for subsequent discipline he received.

In her decision, Judge Dawson wrote that "Respondent shall make Charging Party Charles Robinson whole for losses, earnings, and other benefits that he suffered as a result of the unlawful discipline imposed on him . . .." (ALJD p. 27, lines 7-9); however, she did not specify how Robinson would be made whole. For this reason, Counsel for the General Counsel requests that the Board issue an order specifically defining how Robinson's discipline will be altered pursuant to the parties' progressive disciplinary procedure since Judge Dawson specifically found that Robinson's April 24, 2017 suspension violated the Act.

The evidence clearly establishes that Respondent and the Union have a progressive disciplinary procedure.[2] The evidence also clearly establishes that Respondent generally followed the agreed-upon progressive disciplinary procedure with regard to Robinson. Therefore, it follows that the amount of discipline Robinson received on April 27, 2017 and October 17, 2017 relied on the suspension issued to Robinson on April 24, 2017. It also follows that the discipline Robinson received on April 27, 2017 and October 17, 2017 were increased due to the nature of the progressive disciplinary procedure and because Robinson wrongfully received a balance of shift and three day suspension on April 24, 2017. No subsequent discipline

[2] At no point on the record did Respondent provide any evidence it does not follow the progressive disciplinary procedure set forth in Joint Exhibit 2 and Robinson testified about the progressive nature of the parties' disciplinary procedure.

issued to Robinson by Respondent would have pushed him to the higher levels he ultimately received but for the unlawful discipline. Since Judge Dawson determined that the April 24, 2017 suspension was unlawful, the Board should issue an order stating that any make whole remedy issued in this case should reduce the April 27, 2017 and October 17, 2017 suspensions to lower levels on the parties' progressive disciplinary procedure. Further, any make whole remedy should include backpay incurred as a result of the increased amount of days Respondent suspended Robinson on April 27, 2017 and October 17, 2017 because it relied on the unlawful April 24, 2017 suspension and the progressive disciplinary procedure.

If the Board agrees with Counsel for General Counsel and finds Robinson's April 27, 2017 suspension unlawful, the Board should Order Respondent to reduce any discipline Robinson received subsequent to Robinson's April 24, 2017 **and** April 27, 2017 suspensions. Respondent should be required to reduce Robinson's October 17, 2017 suspension to a level consistent to where he would have been on the progressive disciplinary procedure had he not received the April 24 and April 27 suspensions.

For the reasons set forth above, the Board's order should also include the backpay Robinson incurred as a result of the increased number of days Respondent suspended Robinson on October 17, 2017 because it relied upon the April 24 and April 27, 2017 suspensions.

IV. CONCLUSION

The record establishes that the Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act when it suspended Charles Robinson for statements he made during a labor-management meeting on April 25, 2017. Accordingly, Counsel for the General Counsel requests that the Board reverse the ALJD on the April 27, 2017 suspension and issue an appropriate order requiring Respondent to cease and desist from such unlawful conduct. Further, for the reasons

set forth above, Counsel for the General Counsel also requests that the Board set forth a remedy that reduces discipline issued to Robinson subsequent to the unlawful suspensions, pursuant to the Local Agreement's progressive disciplinary procedure.

Respectfully submitted,

/s/ Lauren Fletcher
Counsel for the General Counsel

Date: October 31, 2018